IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 457 of 2007

With

CRIMINAL MISC.APPLICATION No. 2627 of 2007
In
CRIMINAL APPEAL No. 457 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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BHAVESH MULJI BATHWAR - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :

MS REKHA H KAPADIA for Appellant(s) : 1 in both matters
MRS HB PUNANI, APP for Opponent(s) : 1 in both matters

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 14/09/2007

CAV COMMON JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. This appeal is directed against the judgment and order dated 29th March, 2005 passed by the learned Addl. Sessions Judge, Fast Track Court No.7, Jamnagar, in Sessions Case No.139 of 2002 whereby the appellant has been convicted for the offences punishable under Secs.448, 380, 363, 364-A, 387, 376(2)(f), 377, 302 and 201 of Indian Penal Code and sentenced to undergo rigorous imprisonment of three months and to pay fine of Rs.250/-, in default, to undergo simple imprisonment for 10 days for the offence under Sec.448 of IPC; six months rigorous imprisonment and to pay fine of Rs.500/-, in default, to undergo simple imprisonment for fifteen days for the offence under Sec.380 of IPC; rigorous imprisonment of three years and to pay fine of Rs.2000/-, in default, to undergo simple imprisonment for one month for the offence under Sec.363 of IPC; imprisonment for life and to pay fine of Rs.5000/-, in default, to undergo simple imprisonment for six months for the offence under Sec.364-A of IPC; rigorous imprisonment of two years and to pay fine of Rs.1000/-, in default, to undergo

simple imprisonment for one month for the offence under Sec.387 of IPC; rigorous imprisonment of ten years and to pay fine of Rs.15,000/-, in default, to undergo simple imprisonment for six months for the offence under Sec.376(2)(f) of IPC; rigorous imprisonment of five years and to pay fine of Rs.3000/-, in default, to undergo simple imprisonment for two months for the offence under Sec.377 of IPC; rigorous imprisonment of life imprisonment and to pay fine of Rs.25,000/-, in default, to undergo simple imprisonment for one year for the offence under Sec.302 of IPC and rigorous imprisonment of one year and to pay fine of Rs.1000/-, in default, to undergo simple imprisonment for 15 days for the offence under Sec.201 of IPC.

2. The case of the prosecution is that the complainant Ramangiri @ Rameshgiri Babugiri Goswami had lodged a complaint at the Kalawad Police Station stating that he was residing at Bawana Math, outside Nagarwada at Kalawad along with his wife, son and daughter and had a factory by the name of Saurashtra Emery Pvt. Ltd at Ranuja Road at Kalawad. On 25th March, 2002, they were sleeping on the second floor of their residence and as it was summer season, they had kept the door of the room open. Early in the morning at about 4.45 O'

clock, there was a thumping noise on the wooden staircase in the room due to which, the complainant woke up and saw that his daughter (hereinafter referred to as 'the victim”) was not in the bed. He, therefore, came down the stairs to inquire and found someone carrying his daughter and running away and hence, he went after him. When he came on the road, he met Gafarsha Babusha, who told him that a man carrying a girl had gone near Santoshi Mata temple. On going a little further, he met Muljibhai Rathod who also told him that a man carrying a girl had gone towards Santoshi Mata temple. Thereafter, he looked here and there but could not find anyone carrying his daughter. He, therefore returned home. Upon returning home, he found that his Samsung mobile phone bearing No.9825053048 was missing and he also saw a pair of slippers lying under the staircase, which did not belong to any of his family members.

3. The complainant's father was running a school called Vandana Vidyalaya, which had a telephone bearing No.22239 and had a caller ID. At about 8.00 a.m., the complainant received a phone call from his stolen mobile phone on the phone at Vandana School and was told that his daughter was in the custody of the caller. Thereafter, two three phone calls

were received from the same number. At about 8.30 a.m., a phone call was received which was picked up by the complainant's son Chintan, who recognized the voice of the caller to be that of Bhavesh, a resident of Nani Vavdi. The said Bhavesh used to work in their factory and on and off used to come to their residence in connection with his work. As the said Bhavesh was not working properly, he had been fired about three months ago. Bhavesh told that he was speaking from Rajkot and from the sound of traffic coming from the background, it appeared that he was calling up from somewhere on the highway. Thereafter, Bhavesh again called up at 8.40 a.m. and demanded Rs.10.00 lakhs for returning the complainant's daughter and said that he would inform him later as to where the money was to be delivered. This conversation was recorded in the tape recorder. At the relevant time, his daughter was wearing a cream coloured shirt and a midi with brown checks. She was also wearing gold earrings and a nose stud. The complainant suspected that Bhavesh, a resident of Nani Vavdi (hereinafter referred to as 'the accused') had entered his open house, stolen his mobile phone, kidnapped his daughter and demanded Rs.10.00 lakhs by way of ransom. The aforesaid complaint (Ex.107) was recorded by Shri J.K.Vank, Police Sub-

Inspector, Kalavad Police Station. Thereafter, the same was noted down in the station diary and was registered as Kalavad Police Station I.C.R.No.48 of 2002 for the offences punishable under Sections 363, 448, 380 and 387 of the Indian Penal Code.

4. Shri J.K.Vank took charge of the investigation of the case and drew a panchnama (Ex.40) of the audio cassette produced by the complainant in the presence of panchas. Thereafter, as the complainant had informed the investigating officer that the accused had talked with the complainant on the mobile phone from Rajkot, the investigating officer, by means of wireless message, informed all the Police Stations at Jamnagar and L.C.B.Division, Rajkot City as well as all Police Stations of Rajkot(Rural) to search for the accused. The investigating officer thereafter drew a panchnama (Ex.43) of the scene of offence, and recorded statements of witnesses. The complainant had received a call on the Caller I.D. Telephone at his father's school, which was made from the complainant's mobile and the complainant's mobile had a card of Cellforce Company, therefore, the investigating officer called the Investigation Branch at Rajkot and acquainted PSI, Shri R.R.Gohil in detail, regarding the facts of the offence, gave him

the number of the mobile phone and asked him to obtain information from the Cellforce Company regarding the calls made and received from the said number. Accordingly, the Officer Shri R.R.Gohil immediately proceeded to the office of the Cellforce Company and obtained information regarding the calls that were received from the said phone on the day of the incident. Upon obtaining such information, it was found that a call had been made to a local phone at Rajkot bearing No.602634. Upon making inquiry regarding the said telephone number, it was found to be that of Royal Enterprises, situated at Navagam, Rajkot. Thereafter, the said officer went to the said place and upon inquiring as to who had received the said call, a person named Sukhabhai informed that, at about 11 O'clock, he had received the phone call from Bhavesh. Therefore, the said officer interrogated Sukhabhai, who informed him that Bhavesh called him up and told him that the work of kidnapping is accomplished and the money has to be collected. As Sukhabhai knew Bhavesh, the said officer took him along to the Restaurant opposite Rajkot Galaxy Cinema where Bhavesh was going to come and kept watch along with his staff and the panchas. Thereafter, the accused was coming from the opposite side and Sukhabhai informed them

that it was Bhavesh. The concerned officer thereafter, apprehended the accused and carried out a physical search and drew a detailed panchnama (Ex.60). He seized the muddamal and arrested the accused for the offences registered under the aforesaid Kalavad Police Station I.C.R.No.48 of 2002 at 21:55 hours. The concerned officer also recorded statements of witnesses and submitted a report to the Pradyuman Nagar Police Station, issued the muddamal receipt, made noting in the Pradyuman Nagar Police Station Diary and keeping the report along with him, came to the Kalavad Police Station and handed over the custody of the accused, muddamal, panchnama drawn by him, statement of Sukhabhai, report etc. to the PSO, Kalavad Police Station.

5. Thereafter, the accused expressed his willingness to show the place where the dead body of the victim had been buried. Hence, the investigating officer called two panchas and a videographer. He also sent reports for calling the Executive Magistrate of the Taluka as well as the Medical Officer, Community Health Centre, Kalavad. Thereafter, in the presence of panchas, the accused had walked ahead and as stated by him earlier, he stood near a pit near the river and informed them that the dead body of the victim was

buried in the said pit. Thereafter, the accused removed some of the earth and the dead body of the victim became visible. The dead body was taken out from the pit in the presence of the doctor, the Taluka Executive Magistrate and the panchas and a discovery panchnama (Ex.46) was drawn and photography was also taken and the same were kept in the investigation file. Thereafter, the Taluka Executive Magistrate drew the inquest panchnama (Ex.51), filled up the Marnotar Form (Ex.86) and sent the dead body of the victim to the Medical Officer, Kalavad, for conducting autopsy thereof. The Medical Officer recommended that the autopsy be carried out at the M.P.Shah Medical College at Jamnagar. Accordingly, the dead body was sent to M.P.Shah Medical College, Jamnagar. After conducting the autopsy, the doctor, who performed the same, had submitted a short post mortem note (Ex.88) wherein it was stated that the cause of death was “due to strangulation”. It was also stated that the deceased had been raped and had also been the victim of an unnatural offence. Thereafter, on the basis of the said short post mortem note, a report was sent to the learned Judicial Magistrate (First Class), Kalavad, for addition of Sections 302, 201, 376, 377, 364(A) of the Indian Penal Code. Thereafter,

the accused was sent for medical examination along with a report to obtain samples of the blood, saliva, hair and sperm (Ex.78). For the purpose of verifying as to whether the slippers which were found at the scene of offence fit the accused or not, the slippers were put on the feet of the accused in the presence of panchas and they were found to fit him properly and a panchnama of the same (Ex.64) was drawn accordingly. Thereafter, remand was obtained and as the accused went ahead and showed the shop at Rajkot where he had sold the stolen mobile phone, the mobile phone was seized by drawing a discovery panchnama (Ex.57) and the same was kept in the investigation file. The investigating officer thereafter recorded statements of other witnesses. Thereafter, upon receipt of the post mortem note (Ex.87) along with samples taken by the doctor who had conducted the post mortem on the body of the deceased as well as the samples taken by the Medical Officer from the person of the accused and other muddamal were sent to the Forensic Science Laboratory at Junagadh for analysis thereof. The investigating officer submitted a report for preparing the map of the scene of offence, recorded statement of the videographer who had recorded the cassette of the proceedings of the discovery panchnama of

the dead body of the accused. Thereafter, further investigation was taken over by Hareshbhai B.Vora, who issued yadis for obtaining the FSL Report as well as the map of the scene of offence. Upon completion of investigation, a charge sheet was submitted in the Court of learned Judicial Magistrate (First Class), Kalavad on 9th July, 2002 and the same was registered as Criminal Case No.275 of 2002.

6. The case being exclusively triable by the Court of Sessions, the learned Judicial Magistrate (First Class), Kalavad, by his order dated 16th July, 2002 committed the case to the Court of Sessions at Jamnagar where it was numbered as Sessions Case No.139 of 2002 and was transferred to the Court of the learned Addl. Sessions Judge, Fast Track Court No.7, Jamnagar, for disposing the same on merits. The learned Judge framed charge at Ex.25 against the accused for the offences punishable under Sections 448, 380, 363, 364-A, 387, 376(2)(f), 377, 302 and 201 of the Indian Penal Code. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and prayed for trial.

7. To prove the charge against the accused, the prosecution examined as many as 28 witnesses namely, Ramgiri @ Rameshgiri Babugiri

Goswami, P.W.1, Ex.35; Narvirsinh Harishchandrasinh, P.W.2, Ex.39; Yogeshgiri Hareshgiri, P.W.3, Ex.42; Dineshbhai Chandubhai, P.W.4, Ex.45; Haresh Danjibhai, P.W.5, Ex.50; Hemraj Liladhar, P.W.6, Ex.52; Hemraj Liladhar, P.W.7, Ex.55; Satyen Kalyanji Zala, P.W.8, Ex.56; Ismail Jusub, P.W.9, Ex.59; Munvar Yusufali, P.W.10, Ex.61; Gafar Salimbhai, P.W.11, Ex.63; Chintan Ramesh alias Rameshgiri Goswami, P.W.12, Ex.65; Gafarsha Ahmadsha, P.W.13, Ex.66; Jagdish Kanjibhai, P.W.14, Ex.67; Bhavansinh Padmadevsinh, P.W.15, Ex.68; Sukhabhai Bavabhai, P.W.16, Ex.69; Jivanlal Kanjibhai, Circle Officer, P.W.17,Ex.77; Dr.Miteshbhai Narsibhai, P.W.18, Ex.77; Dr.Chetanbhai Biharibhai, P.W.19, Ex.84; Sandipbhai Mahendrabhai Vora, P.W.20,Ex.89; Lakhabhai Bhikhubhai, Executive Magistrate, P.W.21, Ex.93; Keshubhai Mepabhai Jadav, Prohibition Sub-Inspector, Rajkot, P.W.22, Ex.95; Mamadbhai Noormamadbhai Baloch, ASI, Kalavad, P.W.23, Ex.96; Ketanbhai Jayantilal Lakhani, P.W.24, Ex.98; Hariharbhai Bhikhabhai, Police Constable, P.W.25, Ex.100; Rajendrasinh Ranjitsinh Gohil, PSI, DCB, Rajkot, P.W.26, Ex.103; Jivkubhai Kathadbhai Vank, PSI, Jamnagar, P.W.27, Ex.105 and Hareshbhai Bavanjibhai Vora, PSI, P.W.28, Ex.128. The prosecution also produced and proved as many

as 54 documents. However with a view to avoid prolixity, the same are not enumerated hereunder and shall be referred to in the body of the judgment as and when necessary.

8. On submission of closing pursis by the learned APP, the learned Addl. Sessions Judge recorded further statement of the accused under Section 313 of Code of Criminal Procedure qua incriminating evidence. The defence of the accused was in the nature of denial. The accused neither examined any witness nor stepped into the witness box.

9. Thereafter, after hearing the learned advocates appearing for the respective parties, the learned Addl. Sessions Judge delivered the judgment whereby the appellant was convicted as aforesaid which has given rise to the present appeal.

10. Heard learned counsel for the appellant, Ms.Rekha H.Kapadia and learned Additional Public Prosecutor, Ms.H.B.Punani for the State.

11. Learned Advocate Ms. Rekha H. Kapadia, after going through the record and proceedings and the papers available with her, argued that the appellant is innocent and has been falsely implicated in the crime in question. The whole story has been concocted to falsely involve the appellant with the crime in

question. It was submitted that the prosecution case is based only on circumstantial evidence, as there are no eyewitnesses. The witnesses examined by the prosecution are either interested witnesses or somehow or the other connected with the complainant or his family members. It was argued that though the other evidence such as FSL report, Post-Mortem Note, etc. available on record, prove the aspect of homicidal death, the prosecution has failed to connect the appellant with the commission of the crime in question. It was submitted that it is true that the offence in question was a heinous one, however, the prosecution has failed to establish its case against the appellant and as such the appellant is required to be acquitted and the judgement and order of conviction and sentence is required to be set aside. Lastly, the learned Advocate for the appellant has urged the appellant is a young boy and looking to the facts and circumstances of the case, the appeal requires consideration.

12. In order to bring home the charge against the accused the prosecution had examined several witnesses and has also proved and relied upon various documentary evidences. The facts of the case have already been narrated hereinabove; hence, we are not repeating the

same. We would however deal the evidence on record and more particularly the evidence of the important witnesses.

13. Before analyzing the factual aspects, we may briefly refer to the well-settled principles enunciated by the Apex Court, which must be kept in mind while dealing with a case based solely upon circumstantial evidence. It has been consistently laid down by the Supreme Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The well settled principles for construing circumstantial evidence have oft been reiterated by the Supreme Court. In a recent decision of the Supreme Court in the case of ***State of Goa v. Sanjay Thakran*** ((2007) 3 SCC 755) the Supreme Court after considering several earlier decisions in this regard has reiterated the tests that must be satisfied when the case rests upon circumstantial evidence as follows:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a

definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

14. Keeping the aforesaid legal principles in mind we may now examine the evidence led by the prosecution to establish the charge levelled against the appellant.

15. To prove the complicity of the appellant in the commission of the crime in question, one of the important witnesses examined by the prosecution is PW-1, the complainant, Ramgiri @ Rameshgiri Babugiri Goswami who has been examined at Exh.35. This witness has adhered to the version given by him in the First Information Report lodged by him before the police. The prosecution has duly proved the First Information Report Exh.107 through the evidence of this witness. According to this witness on 25.4.2002 as it

was summer they had kept the door leading to the verandah open, and were sleeping. Early in the morning at about 4:45, as he had heard a thumping noise on the wooden staircase, he had woken up and found that his daughter was not on the bed. Therefore, he had come downstairs in search of this daughter and found someone carrying his daughter and running away. He, therefore, followed him, and on the road he had met one Gafarkhan Babusha who had told him that a man carrying a girl had gone towards the Santoshi Mata temple. Further down the road he had met one Muljibhai Rathod who had also told him the same thing. He had therefore, gone to the Santoshi Mata temple and searched for his daughter, but could not find her, hence he had returned home. When he returned home he found that his Samsung mobile phone bearing No.9825053048 was missing. He also found a pair of slippers lying under the staircase, which did not belong to any of his family members. This witness has further deposed that his father was running a school by the name of Vandana Vidyalaya and the school had a telephone with a caller ID and the phone number was 22239. On the same day a phone call was received at about 8:00 a.m. and subsequently two to three other phone calls were received

on the said phone from his stolen mobile phone telling him that his daughter was in the custody of the caller. This witness has further deposed that again at about 8:30 a.m. they had received a phone call and his son Chintan who had picked up the phone, recognized the voice of the caller as that of the accused, who used to work in their factory and used to visit their residence in connection with the factory work and had been fired about three months back. The accused had told him that he was calling from Rajkot, but from the sound of traffic in the background it appeared that he was somewhere on the highway. According to this witness when the accused called up again at 8:40 a.m. he had demanded a ransom of Rs.10 lakhs for returning his daughter and that the said conversation had been recorded in an audiocassette with a tape recorder. He has further deposed that at the relevant time his daughter was wearing a cream coloured shirt and a midi with brown checks. She was also wearing gold earrings and a nose stud. This witness had further deposed that he had suspected that it was the appellant who had kidnapped his daughter and was demanding a ransom of Rs.10 lakhs; he therefore, went to Kalawad Police Station and lodged a complaint (Exh.107). He has

further deposed that he had handed over the audiocassette to the investigating officer under panchnama Ex.40 in the presence of panchas and had also informed the investigating officer that the accused had talked to him from the mobile phone from Rajkot. This witness has also identified the slippers that were lying near the staircase, the audiocassette as well as the mobile phone in the court. He has also identified the voice recorded in the audiocassette, which was played in the court, to be his voice. He has also identified the accused in the court. This witness has further deposed that the accused had no reason to commit such an act, except that as the accused was not working properly, he had been fired; hence with a view to wreak vengeance he had committed the offence in question. The evidence of this witness is fully corroborated by the First Information Report Exh.107. This witness has been subjected to detailed and searching cross-examined by the learned Advocate for the appellant, but nothing worthwhile has been elicited to shake the credibility of this witness.

16. Through the testimony of this witness the prosecution has firmly established the presence of the complainant at his residential house along with the victim and

other family members at 4:45 a.m. The presence of the complainant and his family members at their residence in the wee hours of the morning is quite natural; hence there is no reason to doubt the same. It has also been established that the complainant had received several phone calls on the telephone at his father’s school from his stolen mobile phone, informing him that the victim was in the custody of the caller and demanding Rs.10 lakhs by way of ransom.

17. In support of its case that the appellant had been employed by the complainant the prosecution has examined PW-12, Chintan the son of the complainant who was the first person to identify the voice of the accused on the telephone. The prosecution has also examined PW-15 Bhavinisinh Padmadevsinh at Exh.68 who was working as a watchman at the complainant’s factory at the relevant time. He has deposed that after about seven months since he started working at the factory, an individual by the name of Bhavesh had come there. Thus from the testimonies of the complainant, his son Chintan and the testimony of P.W.15, the prosecution has established beyond reasonable doubt that the appellant was known to the complainant and his family.

18. PW-27 Jivkubhai Kathadbhai Vank, Police Sub-

Inspector, Kalavad Police Station who is the Investigating Officer in the present case has been examined at Exh.105. According to this witness he had recorded the complaint lodged by the complainant and thereafter, wireless messages had been sent to all the Police Stations at Jamnagar and L.C.B. Division, Rajkot City as well as Police Stations at Rajkot (Rural) intimating them to search for the accused. This witness has deposed that he had seized the audiocassette handed over by the complainant under panchnama Exh.40. He has also deposed that he had prepared the scene of offence panchnama Exh.43 and upon inquiry as it was found that the mobile phone from which the phone calls had been received had a simcard of Cellforce Company, he had informed the PW 26 Rajendrasinh Ranjitsinh Gohil, PSI, DCB, Rajkot about the incident and given him the number of the said mobile phone and requested him to obtain information from the Cellforce Company regarding the calls made and received from the said phone number.

19. PW-26 Rajendrasinh Ranjitsinh Gohil has been examined at Exh.103. According to this witness pursuant to the request made by PW-27, he had immediately proceeded to the office of the Cellforce Company and obtained information regarding the calls made from

the said phone on the day of the incident. From the information received by him, it was found that a call had been made to a local phone at Rajkot bearing No.602634. Therefore, he had made inquiry regarding the said telephone number and found that it was the number of one Royal Enterprises, situated at Navagam, Rajkot. Upon making inquiry at the said place it was found that the call was made to one Sukhabhai (PW-16), who disclosed that he had received a phone call from one Bhavesh at about 11 o'clock. Upon interrogating the said person it was revealed that Bhavesh (the appellant) had called him up and told him that the kidnapping was accomplished and only the money remained to be collected. It was also revealed that the accused was going to come to meet the said Sukhabhai at a restaurant opposite Galaxy Cinema at Rajkot. This witness, therefore, took Sukhabhai along with him to the above-mentioned place along with his staff and panchas and kept watch at the said place. Thereafter, the appellant who was coming from the opposite side was identified by Sukhabhai as the accused. He therefore apprehended him in connection with offences registered under the aforesaid Kalawad Police Station I C.R. No.48 of 2002 at 21:55 hours and he had completed all

legal formalities and he has also interrogated the accused whereby it was revealed that the accused had kidnapped the victim from her house and then killed her and buried her dead body in a pit dug up by him near the bank of the river, he, therefore, informed Kalawad Police Station. Thereafter he submitted a report to the Pradyuman Nagar Police Station, issued a muddamal receipt, made noting in the Pradyuman Nagar Police Station Diary and went to the Kalawad Police Station and handed over the custody of the accused, the muddamal, the Panchnama drawn by him, statements of witnesses as well as the report made by him to the PSO, Kalawad Police Station. This witness has identified the accused in the court and has proved the arrest panchnama Exh.60 as well as report Exh.104 submitted by him to the Pradyuman Nagar Police Station. He has also identified the muddamal articles No.3, 4, 5, 6 and 7 by categorically deposing that the same have been seized from the accused at the time of his arrest.

20. The evidence of PW-26 finds support in the testimony of PW-16 Sukhabhai Bavabhai who has been examined at Exh.69. This witness has deposed that he was working at Royal Enterprises, Rajkot and his native place was

Vavdi village of Kalawad taluka and that he knew the appellant as they were studying together. He has also deposed that on 26.4.2002, the appellant had called him up at the Royal Enterprises factory and informed him that he had done the kidnapping and asked him to collect the money for him, which he had refused. He has also supported the say of PW-26 regarding the circumstances under which the appellant was arrested. This witness has also been subjected to lengthy cross-examination; however, nothing has come out to shake his credibility. This witness is an independent witness and has no reason to falsely implicate him; hence, there is no reason to disbelieve his testimony.

21. On a conjoint reading of the testimonies of PW-27, PW-26 and PW-16, the prosecution has established that on 26.4.2002, the appellant had made a phone call to PW-16 at Rajkot from the stolen mobile phone and pursuant to the information given by him to PW-16, PW-16 had led PW-26 along with his staff to the place where the appellant was to come to meet him and on PW-16 identifying the appellant, PW-26 had arrested him under panchnama Exh.60 in the presence of panchas.

22. Reverting back to the testimony of PW-27 the Investigating Officer, this witness has deposed that the accused had willingly

offered to show the place where the dead body of the victim was buried, hence, he had called two panchas, a videographer, Executive Magistrate as well as the Medical officer, Community Health Centre, Kalavad. According to this witness, after preparing preliminary panchnama, the police personnel along with panchas had gone to the place shown by the accused. Thereafter in the presence of all these persons, the accused had walked ahead and pointed out to a pit near the river and said that the victim was buried in the said pit. He thereafter removed some earth from the pit and uncovered the dead body of the victim from the pit. The dead body was taken out from the pit in the presence of the Medical Officer, the Executive Magistrate as well as the panchas and a discovery panchnama (Exh.46) was drawn accordingly. The videographer had video graphed the entire proceeding. The Magistrate drew the inquest panchnama Exh.51, filled up the Marnotar Form Exh.86 and sent the dead body of the victim to the Medical Officer, Kalawad, for post mortem examination. However, the Medical Officer recommended that the autopsy be carried out at M.P. Shah Medical College at Jamnagar, hence the dead body was sent to M.P. Shah Medical College, Jamnagar. A

short post mortem note Exh.88 was submitted after the doctor had performed the autopsy, wherein it was stated that the cause of death was “due to strangulation”. It was also stated that the deceased had been raped and subjected to some unnatural offence. On the basis of the said short post mortem note, a report was sent to the Learned Judicial Magistrate First Class, Kalawad, for addition of Sections 302, 201, 376, 377, 364(A) of the Indian Penal Code. The accused was then sent for medical examination along with a report to obtain samples of the blood, saliva, hair, and sperm. The slippers found at the scene of offence were put on the feet of the accused in presence of the panchas and were found to fit him properly, hence, a panchnama (Exh.64) was drawn to that effect. Thereafter, the accused has further shown his willingness to show the shop where he had sold the mobile phone and therefore after completing legal formalities, the possession of the said mobile phone was taken over by drawing a discovery panchnama which was produced vide Exh.57. The investigating officer thereafter recorded statements of other witnesses. Thereafter, Post Mortem Note (Exh.87) as well as the samples taken by the doctor who had

conducted the post mortem from the body of the deceased, as well as the samples taken by the Medical Officer from the person of the accused and other muddamal were obtained. The statement of the videographer who had recorded the cassette of the proceedings of the discovery panchnama of the dead body of the accused was also recorded.

23. From the evidence of PW-27 it is evident that while preparing discovery panchnama of the dead body of the victim (Exh.46) and inquest panchnama (Exh.51) the Executive Magistrate, videographer, etc. had remained present all throughout. The Panchnama Exh.46 has been proved by the prosecution by examining PW-4, Dineshbhai Chandubhai who is one of the panch witnesses. The Inquest panchnama Exh.51 has been proved by the evidence of PW-5 Haresh Dhanjibhai who is a panch witness and has been examined at Exh.50. Both the aforesaid panchnamas have also been proved through the evidence of PW-21 Lakhabhai Bhikhubhai, Executive Magistrate who has been examined at Exh.93.

24. The learned Advocate for the appellant has not disputed that the deceased had met with a homicidal death. The medical evidence in the present case assumes a great importance because it supports the prosecution case as

regards the charge of rape, commission of unnatural offence and murder by strangulation against the appellant. PW-19 Dr. Chetanbhai Biharibhai who was attached to the M.P. Shah Medical College, Jamnagar has been examined at Exh.84. In his evidence this witness has stated that the dead body of the victim had been brought to the hospital on 27.4.02 at about 9:30 hours for the purpose of performing autopsy thereof, along with inquest panchnama, Marnottar form, etc. He along with Dr. S.B. Bhatt had performed the autopsy on the dead body and found the following external injuries as reflected in column No.17 of the Post Mortem Report Exh.86:

Surface wounds and injuries

(A) Ligature mark: About 15 cms long brownish colour ligature mark of 2-3 mm breadth present transversely over front of neck at the level of middle part of thyroid cartilage. On right side of neck it starts from a point 4 cms below the right mastoid process, transverses front of neck and ends on left side of neck at a point 4 cms below the left mastoid process. Its properties are consistent with constriction by thread in neck.

(B) (1) About 3 x 2 cms sized graze abrasion present over right side of face just outer to right eye. (2) About 6 cms long linear abrasion present

transversely over right cheek with direction towards outer side. (3) About 23 x 6 cms sized area on back of left shoulder and middle part of chest in upper third is contused. (4) About 26 x 10 cms sized area over back of middle parat of chest and abdomen is contused. (5) Whole of left gluteal region and whole left thigh is contused. (6) About 18 x 8 cms sized areas over outer aspect of right side of chest and abdomen show multiple irregular abrasions. (7) About 3 x 2 cms sized graze abrasion present over right part of abdomen 2 cms right to midline at the level of umbilicus. (8) Two 3 cms long linear abrasions present over inner aspect of left ankle region in transverse position with direction towards right side.

(C) About 4 x 3 cms sized graze abrasion present over outer aspect of right elbow region with detachment of cuticle on right side, which is postmortem in nature.

Injuries mentioned in (A) and (B) are fresh and antemortem in nature.

25. He also noticed the following injuries on the private parts of the deceased as recorded in column No.15 of the Post Mortem Report:

Vagina : Vaginal orifice is seen as about 2.5 cm diameter sized dilated opening. Hymen is torn in 3’ o’clock position with antemortem features (Recent). Left vaginal walls

contused in about 4 x 2 cms size area. Per vaginal examinations admits two fingers. Dull whitish colour scanty thick fluid material found in vagina and cervix. Swab from vagina and cervix preserved for further investigation. Considering the age of the victim, these findings are evidence of rape, recent in regard to occurrence.

Anal region: Anus is dilated and size of unstretched anal opening is 4 x 1 cms. (4 cms vertically) Faceal matter is protruded out of lumen. Swab preserved for further opinion. Per anal examination admits four fingers. Wall of anal is contused for 1-2 cms breadth around the canal. These findings are evidence of recent anal intercourse (sodomy).

26. This witness has also deposed that during the course of post mortem examination he had taken samples of viscera, blood, clothes of the victim viz. frock, skirt, underwear, the amulet worn by the victim around her neck, a vaginal swab, an anal swab, samples of hair, etc. all of which were sealed and labelled. Pw-19, Dr. Jani has opined that the cause of death of the victim is due to strangulation, which is possible by the amulet worn round her neck. The doctor has further opined that the victim has been subjected to rape as well as some unnatural offence and that all the injuries sustained by the deceased victim were antemortem. This witness has been subjected to intensive cross-examination by the learned Advocate for the defence, but he

has successfully withstood the same and the prosecution has not been able to elicit anything to corrode the credibility of this witness. This witness has proved the Postmortem report Exh.87 as well as the Short Postmortem Note Exh.88. Thus the medical evidence on record clearly establishes that the deceased victim was subjected to rape and some unnatural offence and thereafter she was strangulated, as ligature marks were present around her neck. Thus the prosecution has proved that before committing the murder of the victim she was subjected to rape and unnatural offences, and thereafter strangulated. We accordingly confirm the finding in this behalf recorded by the trial Court.

27. Another circumstance relied upon by the prosecution is the panchnama of the samples of blood, saliva, hair, nails and sperm of the accused which have been collected in presence of panchas (Exh.62) and has been proved though the testimony of PW-10 Munavar Yusufali, Exh.61. The said panchnama has also been proved through the evidence of PW-18 Dr. Miteshbhai Narsibhai who has been examined at Exh.77. These samples as well as the muddamal articles and samples recovered from the dead body of the victim were forwarded to the Forensic Science Laboratory

for analysis. The prosecution has also proved the forwarding letter Exh.122 whereby muddamal articles had been forwarded to the FSL, the report of the Scientific Officer of the FSL (Exh.123), the FSL Analysis Report (Exh.125) as well as the Serological Report (Exh.126). The FSL Report indicates that the semen stains found on the underwear of the victim were of 'B' group and the semen of the accused was also of 'B' group. Thus, the prosecution has proved that the semen found on the underwear of the victim was that of the accused. This evidence, lends further corroboration to the prosecution case.

28. Another strong circumstance proved by the prosecution is the recovery of the complainant's stolen mobile phone under the provisions of section 27 of the Evidence Act. At this juncture it may be relevant to refer to the chain of events prior to the recovery of the said mobile phone. As stated hereinbefore, the complainant had received phone calls from his stolen mobile phone on the telephone at the school run by his father, which had a caller ID. From the talk with the accused it was revealed that he was talking from somewhere around Rajkot and that the simcard of the stolen mobile phone was of Celforce Company. Hence the investigating officer contacted the

concerned police officer at Rajkot and requested him to trace of the calls made through the stolen mobile phone. Upon making inquiry from the Celforce Company, the last call made through the said mobile phone was traced to one Royal Enterprises and ultimately to one Sukhabhai who was an employee of the said firm. Sukhabhai who turned out to be a friend of the accused revealed that the accused had called him up and told him that the kidnapping was over and the money remained to be recovered. He asked Sukhabhai to recover the money, which he had refused. However, he was to meet Sukhabhai at a restaurant near Galaxy Cinema hence the concerned police officer along with his staff and panchas had gone to the said place and kept a watch. When the accused came there, Sukhabhai identified him and he was thereafter arrested. Thereafter, while in custody the accused had offered to show the shop of one Ketan Lakhani to whom he had sold the mobile phone and the same was seized under panchnama Exh.57. The panchnama Exh.57 has been duly proved by the prosecution through the evidence of PW-8 Satyen Kalyanji Zala who has been examined at Exh.56. PW-24 Ketan Lakhani has been examined at Exh.98. The aforesaid circumstances are strong circumstances

pointing towards the complicity of the accused in the commission of the crime in question.

29. Another circumstance on which reliance has been placed by the prosecution is in respect of the slippers found under the staircase at the residence of the complainant. It has been established that the slippers did not belong to any of the family members and had been seized by the investigating officer. Subsequently, the accused was made to wear the said slippers in the presence of panchas and they were found to fit him, and a panchnama (Exh.64) was drawn to that effect. The panchnama Exh.64 has been duly proved by the prosecution through the evidence of panchwitness PW-11 Gafar Salimbhai (Exh.63). This circumstance also corroborates the prosecution case.

30. Apart from the evidence referred to hereinabove the prosecution has also proved the panchnama Exh.53 whereby the clothes worn by the accused at the time of commission of the offence had been seized through the evidence of PW-6 Hemraj Liladhar who had acted as a panch and has been examined at Exh.52. The prosecution has also proved the arrest panchnama Exh.60 through the testimony of panch witness PW-9 Ismail Jusub who has been examined at Ex.59. The

prosecution has also proved various other evidence such as the certificate of medical examination of the accused (Exh.81), Photographs (Exh.90) etc. Moreover, the prosecution has also been able to establish the motive behind the commission of the offence.

31. From the evidence referred to hereinabove, it is apparent that the prosecution has satisfactorily proved the following circumstances against the appellant:

(i) The first circumstance proved by the prosecution is that the accused was known to the complainant and was in his employment after which he was fired, as his work was not satisfactory.

(ii) The second circumstance proved by the prosecution is that on that fateful day the complainant and his family were sleeping on the upper floor of their house and as it was summer they had left the door open. In the wee hours of the morning the complainant was awakened by a thumping noise on the staircase and found his daughter missing from the bed. On going in search of his daughter he saw a person carrying her and running away. He followed the said person but could not find him or his daughter. While searching

for his daughter he met two persons on the way who told him that they had seen a person carrying a girl going towards the Santoshi Mata temple. He searched for his daughter at the said place but could not find her hence he returned.

(iii) After he returned, he received a phone call from the stolen mobile phone on the telephone at the school run by his father informing him that his daughter was in the custody of the caller. The first circumstance which connects the accused with the crime in question is PW-12 Chintan Rameshbhai recognizing the voice of the accused on the phone, pursuant to which the appellant has been named in the FIR lodged by the complainant. The demand for ransom is also duly proved through the evidence of the complainant coupled with the evidence of the audiocassette recorded by the complainant.

(iv) The next circumstance is the call made from the complainant’s stolen mobile phone which was traced to Royal Enterprises, Rajkot and to one Sukhabhai an employee of the said firm, who on interrogation revealed that the accused had contacted him on telephone and told him that the kidnapping had been accomplished and the money remained to he

collected. Sukhabhai led the police to the place where the accused was to meet him at a restaurant near Galaxy Cinema and identified him, which led to his arrest by PW-26.

(v) The strongest circumstance against the appellant is the disclosure statement under section 27 of the Evidence Act which led to the recovery of the dead body of the victim at the instance of the appellant vide panchnama Exh.46 which has been drawn not only in the presence of panchas but in the presence of the Medical Officer, the Executive Magistrate and the Videographer who has taped the entire proceeding.

(vi) The other circumstance is in the nature of medical evidence in the form of testimony of the Medical Officer who has conducted the post mortem examination and has opined that the deceased had been strangulated and prior thereto she had been subjected to rape and some unnatural offence.

(vii) Then comes the circumstance of the Analysis and Serological Reports of the Scientific Officer of the Forensic Science Laboratory, which establish that the semen found on the underwear of the victim is that of the accused.

(viii) The next circumstance is the recovery of the stolen Samsung Mobile Phone from the shop of PW-24 Ketanbhai Lakhani to whom the accused had sold the said phone at the instance of the accused under Discovery Panchnama Exh.57.

(ix) Other supporting circumstances are the slippers found at the residence of the complainant, which did not belong to any of his family members but were found to fit the accused.

32. The above are very strong circumstances, which can safely be relied upon. They form a complete chain pointing unerringly to the guilt of the appellant and are inconsistent with his innocence.

33. In the entirety of the facts and circumstances narrated hereinabove, we are of the considered opinion that the crime in question is a heinous one, wherein the prosecution has proved beyond reasonable doubt that it is the accused who had kidnapped the minor daughter of the complainant aged about ten years at about 4:45 a.m. on the date of the incident from his residential house and had demanded ransom of Rs.10 lakhs and thereafter killed the victim. Not only that, before killing the victim she had been subjected to rape and

some unnatural offence. Thus, the prosecution has proved the offences under section 376, 377, 302 etc. against the accused beyond reasonable doubt. The Court below hat also dealt with the evidence at length in the impugned judgement and ultimately summarized the same in paragraph 76 of page 113. Since no illegality or irregularity has been committed by the court below while passing the impugned order of conviction and sentence, no interference is warranted in the present appeal.

34. We were taken through the entire evidence by the learned counsel for the parties and we also perused the impugned judgement and order. We do not think it necessary to deal with the evidence of the witnesses in detail in view of the observations made by the Supreme Court in the case of ***State of Maharashtra v. Hemareddy*** (AIR 1981 SC 1417) which reads as under :

> *"…….This Court has observed in Girija Nandini Devi v. Bigendra Nandini Choudry (1967) 1 SCR 93: (AIR 1967 SC 1124) that it is not the duty of the appellate Court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court. Expression of general agreement with*

reasons given by the Court decision of which is under appeal, would ordinarily suffice."

35. For the foregoing reasons, the appeal being devoid of any merit or substance does not deserve to be entertained and is accordingly summarily dismissed.

36. In view of the dismissal of the appeal filed by the original accused, Criminal Miscellaneous Application No.2627 of 2007 for bail does not survive and is disposed of accordingly.

(R.P.DHOLAKIA,J.)

(H.N.DEVANI,J.)

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